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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/014,076	01/27/1998	MAX A. FEDOR	D-1056 DIV3	4092
28995	7590	12/15/2009	EXAMINER	
RALPH E. JOCKE			BUTLER, MICHAEL E	
walker & jocke LPA				
231 SOUTH BROADWAY			ART UNIT	PAPER NUMBER
MEDINA, OH 44256			3653	
			MAIL DATE	DELIVERY MODE
			12/15/2009	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MAX A. FEDOR, ERIC R. COLBURN,
ROBERT G. GILLIO, DANIEL W. NEU, and R. MICHAEL MCGRADY

Appeal 2009-002796
Application 09/014,076
Technology Center 3600

Decided: December 15, 2009

Before LINDA E. HORNER, STEVEN D.A. McCARTHY, and
KEN B. BARRETT, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Max A. Fedor et al. (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 38-53. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF THE DECISION

We AFFIRM-IN-PART.

THE INVENTION

Appellants' claimed invention pertains to a method for dispensing and tracking an inventory of medical items. Spec. 1, ll. 6-8. Claim 38, reproduced below, is representative of the subject matter on appeal.

38. A method for tracking and dispensing medical items comprising the steps of:

placing at least one unit of a plurality of types of medical items in a plurality of storage locations, wherein each storage location holds only one type of medical item at a time;

inputting patient identifying data to a data entry device, wherein the patient identifying data corresponds to a patient;

removing one unit of a type medical item from a storage location with a dispenser mechanism;

modifying a data store using a processor in operative connection with the data store, wherein the processor is in operative connection with the data entry device and the dispenser mechanism, wherein the data store includes data representative of the patient and data representative of the type medical item stored in the storage location, and wherein the data store is modified responsive to the removing step and the inputting step, to include data representative of the dispense of the type medical item for the patient.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Halvorson	US 4,847,764	July 11, 1989 (filed May 21, 1987)
Pearson	US 5,292,029	Mar. 8, 1994 (filed Aug. 29, 1991)
Blechl	US 5,377,864	Jan. 3, 1995 (§ 102(e) date: Mar. 23, 1992)
Pearson	US 5,562,232	Oct. 8, 1996 (filed Feb. 12, 1996)
Meador	US 5,883,806	Mar. 16, 1999 (filed Oct. 2, 1996)

The following Examiner's rejections are before us for review:

1. Claims 48-53 are rejected under 35 U.S.C. § 102(e) as being anticipated by Pearson '029;
2. Claims 38-41, 43, and 45-53 are rejected under 35 U.S.C. § 102(e) as being anticipated by Pearson '232;
3. Claims 39-43, 45-47, and 49-53 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Pearson '232 and Meador;
4. Claims 38-53 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Pearson '232 and Blechl; and
5. Claims 48-53 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Halvorson.

Unless otherwise indicated, citations to the Answer refer to the Supplemental Examiner's Answer mailed July 29, 2008, and citations to the Reply Brief refer to the Reply Brief of Appellants filed September 29, 2008.

ISSUES

The Issue Regarding Rejection No. 1

Appellants argue that Pearson ‘029 does not disclose the “modifying data” step of claim 48 or the step of determining that the user is an authorized user as recited in claim 49. App. Br. 43, 45. Thus, the first issue on appeal is:

Have Appellants shown that the Examiner erred in finding that Pearson ‘029 discloses these recited steps?

The Issues Regarding Rejection No. 2

Appellants argue that Pearson ‘232 is not prior art and that Pearson ‘232 fails to disclose various limitations of the rejected claims. *See* App. Br. 21. The Examiner found that Pearson ‘232 is entitled to the benefit of the filing date of the application that issued as the Pearson ‘029 reference, Final Rej. 10, and that Appellants’ Rule 131 Declaration does not antedate the earlier Pearson reference, Ans. 12. Thus, the next issues on appeal are:

Have Appellants shown that the Examiner erred in determining that Pearson ‘232 is prior art against Appellants’ claims?

Have Appellants shown that the Examiner erred in finding that Pearson ‘232 discloses all of the limitations of the rejected claims?

The Issue Regarding Rejection No. 3

Appellants argue that claim 42 is not obvious over Pearson ‘232 and Meador because Meador does not teach receiving data read from an object in the manner recited, and that the combined references would not produce the claimed invention. *See* App. Br. 63. The Examiner found that Meador

discloses reading data from an object, and concluded that it would have been obvious to substitute reading data from an object for Pearson's manually inputted data. Ans. 8. Thus, the next issue on appeal is:

Have Appellants shown that the Examiner failed to articulate reasoning with some rational underpinning sufficient to support the conclusion that the subject matter of claim 42 would have been obvious?

The Issue Regarding Rejection No. 4

Appellants argue that it would not have been obvious to combine the teachings of Pearson '232 and Blechl, and that the combined teachings would not result in the subject matter of claims 42 and 44. App. Br. 66-67. Thus, an issue on appeal is:

Have Appellants demonstrated that the Examiner erred in concluding that it would have been obvious to combine the teachings of Pearson '232 and Blechl so as to arrive at the subject matter of claims 42 and 44?

The Issue Regarding Rejection No. 5

Appellants argue that Halvorson lacks certain claimed features, and that these features distinguish the claims over Halvorson. App. Br. 69. Thus, another issue on appeal is:

Have Appellants shown error in the Examiner's conclusion that Halvorson renders obvious the subject matter of the rejected claims?

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence.

1. As a divisional application, the effective filing date of the present application is the filing date of its parent application, December 16, 1994. *See* App. Br. 15-16 (in which Appellants assert a “priority date of December 16, 1994”).

2. The Pearson ‘232 patent issued from an application which is a continuation of an application filed April 13, 1995, which is a continuation of an application filed March 7, 1994, which is a continuation-in-part of Ser. No. 751,916, filed August 29, 1991 (which issued as the Pearson ‘029 patent).

3. For the reasons set forth below in the Analysis section, we find Appellants’ Declaration filed May 19, 2006 (the second declaration) to be sufficient to antedate a reference having an effective filing date of March 7, 1994, or later, with respect to claims 38 and 48.

4. An ordinary meaning of “dispenser” is “[o]ne that dispenses, esp. a machine or container that allows the contents to be taken out and used in convenient or prescribed amounts[.]” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984).

5. An ordinary meaning of “mechanism” is a mechanical device or a machine. *Id.*

6. An ordinary meaning of “release” is “[t]o unfasten, free, or let go of.” *Id.*

7. Pearson ‘029 discloses a mobile vehicle (cart 30) comprising medication storage and dispensing units, an onboard microprocessor, a

keyboard, and software. Pearson '029, col. 2, ll. 3-11; col. 3, ll. 45-46; fig. 2. The device contains a tablet/capsule dispenser unit 35 comprising a box frame filled with upwardly open containers and a motorized carriage system that moves platform 94 along the X, Y, and Z axes. *Id.*, col. 3, l. 66 - col. 4, l. 23; col. 4, ll. 55-59; figs. 3-5. Tablets or capsules are located in the containers. *Id.*, col. 4, ll. 15-17. In operation, the nurse enters a patient's identification into the keyboard and the computer moves the platform to a position over the selected container. *Id.*, col. 5, ll. 14-27. Tube 104 is lowered via movement of platform 94 into the selected container, and a vacuum is drawn through the tube for the purpose of lifting and transporting a capsule or tablet. *Id.*, col. 5, ll. 1-7, 28-32. When the platform returns to the home position, the vacuum pump is deenergized, thus releasing the capsule or tablet into the access drawer. *Id.*, col. 5, ll. 33-46. The computer automatically records data such as the medication dispensed, the time, and the patient's identification. *Id.*, col. 2, ll. 29-36; *see id.*, col. 5, ll. 47-53 (the nurse's verification of the computer's data provides a redundancy to enhance accuracy). The software restricts the dispensing to only those medications determined in advance. *Id.*, col. 2, ll. 17-24.

8. Pearson '232 discloses a semi-automated, computer controlled medication dispenser in the form of a wheeled cart 2 having a number of containers 8 for holding medications and a suction tube 12 to withdraw pills and tablets from the containers. Pearson '232, col. 2, l. 18, 27; col. 2, l. 64 - col. 3, l. 4; fig. 1. Pearson '232 states that the dispenser is resistant to pilferage. *Id.*, col. 2, ll. 18-23. The cart has a computer 14 that controls containers 8 and suction tube 12. *Id.*, col. 3, ll. 5, 18-20. A nurse or other worker authorized to enter information enters a password, and, after

authorization, enters patient information and physicians' orders into the computer. *Id.*, col. 4, ll. 24-28. Pearson '232 also discloses that a pharmacist can simultaneously cause all of the containers to unlock by entering a password, then load the medications into the appropriate containers, then confirm to the computer that each medication has been placed in the proper container, and re-lock the containers. *Id.*, col. 4, ll. 32-49.

9. Pearson '232 also discloses that, in operation, the dispensing nurse enters a password to be authorized to use the medication dispenser, rolls the cart to each patient, and then enters identifying information for the patient. Pearson '232, col. 4, l. 60 – col. 5, l. 1. The computer then unlocks the container(s) holding medication for the patient. *Id.*, col. 5, ll. 1-5. The nurse inserts the end of the suction tube into the appropriate container, a sensor 26 at the inlet to the container activates the suction motor, and the tube picks up one pill/tablet at a time. *Id.*, col. 5, ll. 9-13; fig. 2. Sensors 42 in or on the end of the suction tube detect the presence of the pill/tablet. *Id.*, col. 5, ll. 23-40. The signals from the sensors serve as positive confirmation that a pill is being removed from the container, and allow the computer to keep accurate inventory of all the medications. *Id.*, col. 5, ll. 29-31. The computer records the name and amount of all medications dispensed, identity of the patient, time dispensed, and the name of the nurse. *Id.*, col. 6, ll. 18-20.

10. Pearson '232 further discloses that the cart 2, in addition to containers 8, has drawers 10 for holding medical items that are not in pill or tablet form (e.g., ointments, syringes, etc). Pearson '232, col. 3, ll. 1-3; col.

5, ll. 62-67. The appropriate drawer is unlocked by the computer to allow the nurse to manually withdraw the needed item. *Id.*, col. 5, ll. 62-67.

11. Blechl pertains to an automatic controlled drug dispensing device. Blechl, col. 1, ll. 5-7. The device has a touch sensitive user interface screen 30 and a card reader 32. *Id.*, col. 4, ll. 3-15. An individual authorized access to the device is assigned a magnetic, optical or integrated circuit identification card and a personal identification number (PIN). *Id.*, col. 4, ll. 20-23. To initiate the dispensing, the user inserts the identification card into the reader and inputs his or her PIN by way of the touch screen. *Id.*, col. 4, ll. 20-34.

12. Halvorson discloses a system for controlling the dispensing and inventory of medications in a health care institution. *See* Halvorson, col. 1, ll. 6-9. The system utilizes a central computer having keyboard entry units for information entry including patient information. *Id.*, col. 3, ll. 15-19. Halvorson discloses a preferred embodiment that includes electro-mechanical dispensers 32 having display units and keyboards. *Id.*, col. 3, ll. 28-30. The dispensers are located at nursing stations, are operatively connected to the central computer, and employ spiral drive members 50 supported on trays 52. *Id.*, col. 3, ll. 31-40; fig. 2. Halvorson's preferred dispensing station has a dispenser containing a plurality of medications that may be automatically dispensed to authorized personnel on demand. *Id.*, col. 4, ll. 27-30. Halvorson's spiral drive member is a dispenser mechanism within the meaning of Appellants' claimed invention. In the dispenser 32, the drive motor of the spiral drive member is actuated "to release a dose of a particular medication." *Id.*, col. 3, ll. 40-43, 60-63. Thus, Halvorson teaches

removing a medical item from a storage location (the tray) with a dispenser mechanism.

13. Halvorson's system's dispenser operator interpreter, in response to commands from the central computer, causes the dispenser to lock and unlock access doors 40. Halvorson, col. 3, ll. 47-59; fig. 2. Halvorson further discloses:

Although the dispenser 32 is used primarily to dispense unit dose medications, it may control multi-dose and bulk packages such as creams, ointments, vials, etc., where the patient receives the initial package from the dispenser 32 and the unused portion is stored in the patient's drawer for subsequent use later.

Id., col. 5, ll. 3-8. Because the drawers hold unused portions of certain medical items and the dispenser controls those items, one of ordinary skill would understand that the drawers are located behind the computer controlled access doors.

14. Halvorson's system has a PATIENT ORDER file that contains patient information. Halvorson, col. 10, ll. 1-5. The system also has a MEDICATION HISTORY file for each day containing a record for each pharmacy related transaction including: the date and time of the transaction, transaction record type (a drug charge or credit), identification of the personnel associated with the transaction, identification and quantity of the drug, dispensing location (*e.g.*, at the dispenser), and patient identification. *Id.*, col. 10, l. 59 – col. 11, l. 5; *see also id.*, col. 12, ll. 65-68 (The MEDICATION HISTORY file is created for each day, and contains the dispense data for all patients for that day.). The system also has a PATIENT HISTORY file for each patient that contains a record for each pharmacy related transaction including much of the same information as listed above

for the MEDICATION HISTORY file. *See id.*, col. 10, ll. 44-58. These files are continuously maintained during normal system usage. *Id.*, col. 12, ll. 38-43.

15. Halvorson's system also has a PERSONNEL MASTER file containing identification of and password for each employee that will have access to the system, and an application access control array that specifies which programs or processes the person is allowed to execute. Halvorson, col. 11, ll. 7-24. Nurses are normally authorized, via the application access control array in the PERSONNEL MASTER file, to execute the "Routine Meds" function. *Id.*, col. 22, ll. 37-39. During the execution of this function, the nurse selects a specific patient (by name, ID number, etc.) and the mechanical dispenser delivers to the nurse the medications to be administered to the patient during the current hour. *See id.*, col. 22, ll. 39-64.

16. The prior art of record indicates that the person of ordinary skill in the art of medical item dispensing systems – as of Appellants' asserted priority date of December 16, 1994 – had a high level of skill. *See, e.g.*, Halvorson, col. 2, ll. 39-61; figs. 1, 2; Pearson '029, col. 1, ll. 48-68.

PRINCIPLES OF LAW

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the specification. *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969); *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). It is the Appellants' burden to precisely define the invention, not that of the United States Patent and Trademark Office. *In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997)

(citing 35 U.S.C. § 112, ¶ 2). Appellants have the opportunity to amend the claims during prosecution, and broad interpretation by the Examiner reduces the possibility that the claim, once issued, will be interpreted more broadly than is justified. *Prater*, 415 F.2d at 1404-05. When interpreting claims, we must be careful not to read a particular embodiment appearing in the written description into the claim if the claim language is broader than the embodiment. *See SuperGuide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004).

In order for a U.S. patent reference to be entitled to an effective filing date under 35 U.S.C. § 102(e) of an application to which it claims priority, the earlier application must disclose, pursuant to §§ 120/112, the invention claimed in the later reference. *In re Wertheim*, 646 F.2d 527, 537 (CCPA 1981). Where a continuation-in-part application is involved, “the type of new matter added must be inquired into, for if it is critical to the patentability of the claimed invention [in the later reference patent], a patent could not have issued on the earlier filed application” and the reference patent is not entitled to the earlier filing date for purposes of a § 102(e) rejection. *See id.* at 536.

Rule 131 of the Rules of Practice in Patent Cases states:

(a) When any claim of an application . . . is rejected, the inventor of the subject matter of the rejected claim . . . may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference or activity on which the rejection is based.

....

(b) The showing of facts shall be such, in character and weight, as to establish reduction to practice prior to the effective date of the reference, or conception of the invention

prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent reduction to practice or to the filing of the application. Original exhibits of drawings or records, or photocopies thereof, must accompany and form part of the affidavit or declaration or their absence must be satisfactorily explained.

37 C.F.R. § 1.131 (2006).

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987) (citations omitted).

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007) (quoting 35 U.S.C. § 103). The operative question in an obviousness analysis is “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.* at 417.

In *KSR*, the Court rejected the rigid requirement of a teaching, suggestion or motivation to combine known elements, and noted that an obviousness analysis “need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 418-19.

ANALYSIS

Rejection No. 1: The rejection of claims 48-53 under 35 U.S.C. § 102(e) as being anticipated by Pearson '029

Claim 48

Appellants argue that Pearson '029 does not disclose the “modifying data” step of claim 48. App. Br. 43. Specifically, Appellants assert that the claim requires the modification of an existing data store, and that Pearson '029 creates a new file for newly recorded data. *Id.* at 44. Appellants also assert that Pearson '029 does not disclose the modification of data “representative of the dispense of the type medical item for the patient.” *Id.*

Appellants’ Specification describes an example of modifying a data store in which the use of a medical item is recorded in the data store upon the items’ removal from a storage location. Spec. 6, l. 15 – 7, l. 2. Pearson '029 similarly discloses that the computer automatically records data such as the medication dispensed from storage containers, the time, and the patient’s identification. Fact 7. The software of Pearson '029 restricts the dispensing to only those medications determined in advance, *id.*, thus there is an existing data store prior to the recording of the data during the dispensing operation. As such, we do not perceive error in the Examiner’s finding, Ans. 4, that Pearson '029 discloses the recited step of “modifying data in at least one data store” when the claim is given the broadest reasonable construction consistent with the Specification. We affirm the rejection of claim 48 as anticipated by Pearson '029.

Claims 49-53

Appellants argue that Pearson '029 does not disclose determining that the user is an authorized user as recited in claim 49. App. Br. 45. The

Examiner refers to column 5, lines 14-21, of Pearson ‘029 as support for the finding regarding an authorized user. Ans. 4. This portion of the reference does not appear to disclose the step of determining that the nurse is an authorized user. Accordingly, we do not sustain the rejection of claim 49, or its dependant claims 50-53, as anticipated by Pearson ‘029.

Rejection No. 2: The rejection of claims 38-41, 43, and 45-53 under 35 U.S.C. § 102(e) as being anticipated by Pearson ‘232

We first address Appellants’ argument that Pearson ‘232 is not prior art because the reference is not entitled to the filing date of its great-grandparent application and because Appellants’ Rule 131 Declaration antedates the Pearson reference. *See* App. Br. 15-18.

Appellants contend that Pearson ‘232 is not entitled to the filing date of the great-grandparent application (which issued as the Pearson ‘029 patent) because there is a continuation-in-part (CIP) application in Pearson’s chain of priority, and Pearson ‘232 contains new matter critical to the invention of the Pearson ‘232 patent. Reply Br. filed Mar. 31, 2003, at 3 (citing *In re Wertheim*, 646 F.2d 527, 537 (CCPA 1981)); *see also* App. Br. 16, 17. The Examiner found that Pearson ‘232 is entitled to the filing date of Pearson ‘029 with respect to the subject matter relied upon in the rejection. Final Rej. 10. Specifically, the Examiner found that Pearson ‘029 “fully discloses the elements from which the rejections of which Pearson ‘232 [is] relied upon in rejecting claims 38-50 and 52” *Id.* The Examiner asserts that “[a] reference is entitled to the priority date of earlier CIP-linked matter commonly disclosed in an earlier application.” Ans. mailed Feb. 13, 2003, at 16. However, the Examiner’s approach is similar to that held to be incorrect in *Wertheim*, 646 F.2d at 536. Even if the subject matter relied

upon in the rejection is supported by the earlier Pearson application, the reference patent (Pearson '232) must be examined to determine whether the invention claimed therein was disclosed, in accordance with § 112, by the earlier application. *Wertheim*, 646 F.2d at 537. In other words, any new matter should be evaluated to determine whether it was critical to the claimed invention of Pearson '232. *Id.* at 536. The Examiner has not made findings directed to this, and therefore has not made a *prima facie* showing that the Pearson '232 reference is entitled to the filing date of the great-grandparent application.

Pearson '232 issued from an application which was a continuation of an application which was a continuation of an application filed March 7, 1994. Fact 2. Appellants do not suggest that any new matter was introduced in that chain of priority after March 7, 1994. *See* App. Br. 16. Thus, for purposes of this appeal we assume that the § 102(e) date for Pearson '232 is the filing date of the grandparent application, March 7, 1994.

We now consider the declaration issue. During the course of prosecuting the present application, Appellants have submitted two declarations pursuant to 37 C.F.R. § 1.131 (Rule 131) in an attempt to antedate Pearson '232 and Meador. The first declaration contained an apparent inconsistency in that the sole Declarant stated that he is a joint inventor of the subject matter of all of the claims on appeal (claims 38-53), yet repeatedly used singular pronouns in referring to the invention and the activities related to the development thereof. *E.g.*, McGrady Decl. filed Aug. 30, 2000, ¶ 5(a) ("my invention"), ¶ 5(b) ("I assembled"). Earlier merits panels of this Board twice remanded the application to the Examiner for further consideration of the declaration in light of this inventorship issue.

Ex parte Fedor, Appeal No. 2003-1769, July 23, 2004; *Ex parte Fedor*, Appeal No. 2005-1136, Sept. 15, 2005. Additionally, the previous panels – based on a “cursory” review of the first declaration – found the evidence of the activities leading to the reduction to practice lacking. *See* Decision in Appeal No. 2003-1769 at 4. In an attempt to resolve the declaration issues, Appellants submitted a second declaration on May 19, 2006. *See* Remarks filed May 19, 2006, at 2. The Examiner discusses the second declaration in the Supplemental Answer. Ans. 11-12. Appellants state that they understand that the second declaration has been entered into the record. Reply Br. 5. The Examiner does not dispute this understanding. *See* Office Communication mailed Dec. 8, 2008. Thus, we also proceed with the understanding that the second declaration has been entered and considered by the Examiner.

The Examiner reiterates the previous panels’ concerns regarding the inventorship issue, stating that the substitute declaration still contains the inconsistency and that Appellants have failed to identify the inventors of the claims of the invention. Ans. 11-12. In response, Appellants indicate that the claims that are the subject of the declaration are only claims 38 and 48, and that the Declarant is the sole inventor of the subject matter of those two claims. Reply Br. 6; *see also* Decl. filed May 19, 2006, ¶ 2. Appellants also note that they are attempting to antedate the cited references with evidence of actual reduction to practice prior to March 7, 1994, and assert that evidence of activities leading to a reduction to practice pertains to diligence and is, therefore, unnecessary as they are not relying on diligence. *See* Paper filed Jan. 17, 2006, at 14. We determine that Appellants have adequately addressed the concerns of the previous panels.

The Examiner does not appear to have found the second declaration otherwise insufficient to antedate a reference having an effective filing date on or after March 7, 1994, with regards to claims 38 and 48. *See* Ans. 11-12; *see also* Decl. filed May 19, 2006, ¶ 5 (describing the operation of a medical tracking and dispensing system prior to March 7, 1994, and testifying that system worked for its intended purposes). Thus, neither the Examiner nor Appellants have raised any other issue regarding the declaration for our consideration. Accordingly, we find the second declaration to be sufficient to antedate a reference having an effective filing date of March 7, 1994, or later, with respect to claims 38 and 48. As Appellants do not attempt to antedate the remaining claims on appeal, a reference having a § 102(e) date earlier than December 16, 1994 (the effective filing date of the present application, Fact 1) is prior art to those remaining claims. Thus, Pearson ‘232 is not prior art to claims 38 and 48, but is prior art to claims 39-47 and 49-53.

Claim 38

Because Appellants’ Rule 131 Declaration antedates – with respect to independent claim 38 – the critical date of Pearson ‘232, we reverse the rejection of claim 38 as anticipated by Pearson ‘232. However, Pearson ‘232 is prior art to the claims that depend from claim 38 and those dependent claims necessarily include the limitations of claim 38. Therefore, we now address Appellants’ arguments as to why Pearson fails to disclose the limitations of claim 38.

Appellants argue that Pearson ‘232 fails to disclose the “removing” step of independent claim 38. App. Br. 21. Appellants assert that the claim

requires that a dispenser mechanism perform the step of removing a medical item, and that Pearson '232 only discloses a nurse manually removing a medical item with a suction tube. App. Br. 21-22. Appellants' argument is not commensurate with the language of claim 38. The claim recites "removing one unit of a type medical item from a storage location with a dispenser mechanism." Thus, someone or something must remove an item with a dispenser mechanism. The claim language does not exclude a human performing the removing act by manipulation of a dispenser mechanism.

Appellants also argue that Pearson's suction tube 12 does not constitute the recited "dispenser mechanism." App. Br. 22. We give pending claims their broadest reasonable construction consistent with the specification. *Prater*, 415 F.2d at 1404-05. Appellants' Specification describes a "vial dispensing mechanism" that is part of a magazine 168, and indicates that there are several magazines in a medicine dispenser 100. *See* Spec. 40, ll. 9-18. A disclosed dispensing mechanism embodiment utilizes electronically operated gates that allow a vial of medicine to drop from an inclined magazine into a pocket from which the vial may be taken by the user. Spec. 41, ll. 4-6; 44, l. 3 – 45, l. 5; figs. 18-20, 27; App. Br. 5. The language of Appellants' claim is broader than the embodiments disclosed, and the Specification confirms that the descriptions and illustrations in the Specification are only exemplary and are not intended to be limiting. Spec. 47, ll. 7-14. In light of the Specification and the ordinary meanings of "dispenser" and "mechanism," Facts 4 and 5, we construe "dispenser mechanism" to refer to a mechanical device or machine that is part of a larger machine and that allows the contents to be taken out in convenient or prescribed amounts. This construction is consistent with Appellants' usage

of the phrase. *See* App. Br. 11 (referring to the Pearson '029 reference's tablet/capsule dispenser unit 35, which is part of the overall cart, as a "dispenser mechanism"); Fact 7. Pearson '232 discloses a semi-automated medication dispenser in which a nurse removes pills and tablets from a container with a computer-controlled suction tube. Facts 8, 9. We are not persuaded that the Examiner erred in finding that the suction tube of Pearson '232 constitutes a "dispenser mechanism" when the claim is given the broadest reasonable construction consistent with the Specification.

Appellants further argue that Pearson '232 does not disclose the modification of the data store "responsive to the removing step and the inputting step, to include data representative of the dispense of the type medical item" for the patient. App. Br. 23. Appellants contend that Pearson '232 lacks verification that the medication is actually dispensed (removed from the container) and lacks confirmation that a particular type of medical item as actually having been dispensed. App. Br. 24-26. Claim 38 does not require the verification and confirmation that Appellants suggest. Pearson '232 discloses sensors 42 that confirm that a pill is being removed from a container after inputting patient information and that the computer records the name and amount of all medications dispensed. Fact 9. Thus, Pearson '232 discloses the recited modification of data responsive to the removing and inputting steps even though data occasionally might also be modified when a pill is dropped back into the container.

Claim 39

Appellants argue that Pearson '232 lacks a data store including data representative of a plurality of authorized users and does not disclose

comparing the inputted user data with that of a plurality of authorized users in the data store. App. Br. 27, 29. Appellants' argument is not persuasive. One purpose of the system of Pearson '232 is to inhibit pilferage. Fact 8. To that end, the system has multiple authorized users with multiple passwords for different levels of access. A person authorized to enter patient information first enters a password to do so. Fact 8. A pharmacist, in order to fill the containers, enters a password which unlocks all the containers at once. *Id.* On the other hand, the entry of a dispensing nurse's password, in combination with a specific patient's identification, unlocks only those containers that are appropriate for the specific patient. Fact 9. Therefore, Pearson '232 discloses a computer with a data store including data representative of a plurality of authorized users, and determining whether a user's data corresponds to data for an authorized user.

Appellants further argue that Pearson '232 lacks a processor with the capability to control the dispenser device. App. Br. 27. We do not find this argument persuasive. While dependent claim 39 recites a "dispenser device," its parent claim 38 contains the term "dispenser mechanism." Appellants' Specification indicates that "dispenser device" refers to the overall medicine dispenser that includes a dispensing mechanism. *See Spec.* 40, ll. 15-19 (medicine dispenser 100 houses a number of magazines each including a vial dispensing mechanism). However, it does not affect the outcome if the dispenser device refers to the dispenser mechanism of claim 38 or the overall medicine dispenser that includes the dispensing mechanism. Pearson's suction tube (the dispenser mechanism), the individual containers on the cart, and the overall dispenser device are all computer controlled. *See* Fact 8.

Appellants have not shown error in the rejection of claim 39 as anticipated by Pearson '232, and we sustain that rejection.

Claim 40

Appellants argue that the device of Pearson '232 is not capable of producing an accurate record that the medical item was actually dispensed. App. Br. 30. Appellants assert that the pill, in Pearson '232, could be dropped "without ever being dispensed or reaching the patient." *Id.* However, the claim does not require an accurate record or that the pill reach the patient. Claim 40 recites: "in the modifying step [of claim 39] the data store is further modified to include data representative of a record that the authorized user determined is [sic] the determining step dispensed the type medical item." Appellants' Specification indicates that dispensing is complete when the medication has left the storage component. Spec. 45, ll. 13-17; fig. 27 (sensor 179, located near the end of the magazine and above the pocket, transmits a signal indicating that the medical item has been dispensed when the vial passes out of the magazine). Thus, claim 40 merely requires that the data store be modified to indicate that the particular authorized user caused the medical item dispenser to operate. Pearson '232 satisfies this limitation as the computer records the name of the dispensing nurse when the sensors confirm that the pill is removed from the container. Fact 9. Appellants have not shown error in the rejection of claim 40 as anticipated by Pearson '232, and we sustain that rejection.

Claim 41

Appellants argue that Pearson '232 does not disclose requiring identifying information for two different authorized users before allowing the removing step to be performed. App. Br. 30-31. The portion of Pearson '232 to which Examiner directs our attention, Ans. 7 (citing col. 4, l. 60 – col. 5, l. 8), refers to only a single dispensing nurse rather than two different authorized users. As such, we cannot sustain the rejection of claim 41 as anticipated by Pearson '232.

Claim 43

Claim 43 recites the step of “sensing with a verification sensor the dispense of the type medical item removed in the removing step” and that the data modifying step is not performed if dispense is not sensed. Appellants argue that the sensors 42 of Pearson '232 are not capable of verifying the actual dispense of an item because a pill might be dropped after being sensed and that Pearson's device is not “capable of not performing a modifying step ‘if the dispense of the item is not sensed . . . ’” App. Br. 31-32. We are not persuaded of error in the rejection. The reference discloses that signals from the sensors serve as positive confirmation that a pill is being removed from the container, allowing the computer to maintain an accurate inventory. Fact 9. The rejection of claim 43 as anticipated by Pearson '232 is sustained.

Claim 45

Dependent claim 45 adds to the removing step of claim 38 the step of opening an electronic drawer. That removing step is performed with a

dispenser mechanism. *See* claim 38. Although the Examiner correctly points to the disclosure of an electronic drawer in Pearson ‘232, Ans. 7, the removal of items from that drawer does not involve a dispenser mechanism, *see* Fact 10. Thus, Appellants are correct that Pearson does not disclose opening an electronic lock drawer in the removing step, App. Br. 32. We do not sustain the rejection of claim 45 as anticipated by Pearson ‘232.

Claim 46

Appellants argue that Pearson ‘232 does not disclose releasing a container in the removing step. App. Br. 32-33. The Examiner found that Pearson describes the dispensing of containers. Ans. 13; *see also id.* at 7. As it appears that Pearson’s containers remain in the cart during dispensing and are not removed with the suction tube during the removal of medications, we fail to see how a container is “dispensed.” We do not sustain the rejection of claim 46 as anticipated by Pearson ‘232.

Claim 47

Claim 47 adds to the removing step of claim 38 the step of opening a lock to enable access to a storage location. Appellants reiterate their argument that Pearson ‘232 fails to disclose the recited removing step because there is no dispenser mechanism, and that it follows that Pearson does not disclose opening a lock in that missing removing step. App. Br. 33. For the reasons given above, we disagree with Appellants’ argument regarding the dispenser mechanism. Appellants have not shown error in the Examiner’s finding that Pearson ‘232 discloses the step of opening a lock

during the removal step, Ans. 7. *See* Fact 9. We sustain the rejection of claim 47 as anticipated by Pearson ‘232.

Claim 48

Appellants argue that Pearson ‘232 is not prior art for claim 48. App. Br. 18. For the reasons set forth above, we agree. Accordingly, we reverse the rejection of claim 48 as anticipated by Pearson ‘232.

Claim 49

Claim 49 recites “storing data . . . indicating that the at least one of the type medical item has been provided for the patient.” Appellants argue that Pearson ‘232 does not disclose the “storing data” step. App. Br. 38. Specifically, Appellants assert that Pearson’s sensors 42 do not allow the verification or confirmation that a pill is actually dispensed and that the system does not verify that the correct type of medical item has been dispensed. App. Br. 39, 40. Claim 49 requires providing access to a medical item from “a storage device” (step e), and then storing data indicating that the item has been provided for the patient (step f). Thus, the claim merely requires that the data reflect that the item was made available (access provided), but not the verification that the correct item was actually dispensed. As Appellants concede, Pearson “automatically updates the records to reflect the (assumed) dispensing of a medical item.” App. Br. 39; *see* Fact 9. However, Pearson indicates that the dispensing is not merely assumed to have occurred, but rather the sensors 26 allow the computer to keep accurate records of dispensed medications. Fact 9. As such, Appellants have not shown error in the Examiner’s finding, Ans. 13-14, that

Pearson discloses recording data regarding dispensed medication.

Appellants have not persuaded us of error in the rejection of claim 49 as anticipated by Pearson ‘232, and we affirm that rejection.

Claim 50

Dependent claim 50 adds to step (e) of claim 49 the requirement of dispensing the medical item “from a dispenser device.” Appellants assert that Pearson ‘232 does not disclose dispensing using a dispenser device (which Appellants suggest is the same as a dispenser mechanism). App. Br. 41. As discussed above in the context of the rejection of claim 39 as anticipated by Pearson ‘232, “dispenser device” refers to the overall medicine dispenser that includes a dispensing mechanism. We are not persuaded of error because Pearson discloses dispensing pills and tablets from a dispensing device (the overall medication dispenser in the form of a cart with containers and a suction tube dispenser mechanism). Fact 9. We sustain the rejection of claim 50 as anticipated by Pearson ‘232.

Claim 51

Appellants merely point out what claim 51 recites and states that “Pearson ‘232 does not disclose the recited features and relationships in the manner recited.” App. Br. 41. Even if this statement constitutes an argument for patentability under 37 C.F.R. § 41.37(c)(1)(vii), Appellants do not explain with specificity as to why the Examiner erred.

Claim 51 recites the step of unlocking a drawer to enable access to a medical item. Unlike claim 45, neither claim 51 nor independent claim 49 (from which claim 45 depends) requires a dispensing mechanism. Pearson

‘232 discloses that the computer unlocks a drawer to enable access to medical items. Fact 10. Appellants have not persuaded us that claim 51 was erroneously rejected as anticipated by Pearson ‘232, and we sustain that rejection.

Claim 52

Claim 52 depends from independent 49 and recites releasing a medical item from a device holding such an item. Appellants argue that Pearson ‘232 does not disclose a device holding a medical item or releasing the item from the device. App. Br. 41-42. We disagree. An ordinary meaning of “release” is to free or let go of. Fact 6. This meaning is consistent with Appellants’ Specification, which describes an embodiment in which operation of the vial dispensing mechanism releases vials from a magazine and allows them to fall down a chute. Spec. 40, l. 16-19. Pearson discloses that medical items are held in containers and drawers, and that the computer, when appropriate, allows the items to be removed. Facts 9, 10. In other words, the computer releases the items. Appellants have not shown error in the rejection of claim 52 as anticipated by Pearson ‘232, and we sustain the rejection.

Claim 53

Appellants again merely point out what claim 53 recites (opening a lock to enable access to the storage location) and states that “Pearson ‘232 does not disclose the recited features and relationships in the manner recited.” App. Br. 42. As Appellants do not explain with specificity as to why the Examiner erred, we are not persuaded of any such error. Further,

Pearson discloses unlocking both containers and drawers. Facts 8-10. We sustain the rejection of claim 53 as anticipated by Pearson '232.

Rejection No. 3: The rejection of claims 39-43, 45-47, and 49-53 under 35 U.S.C. § 103(a) as being unpatentable over Pearson '232 and Meador

The Examiner has rejected several claims as obvious over Pearson '232 and Meador. However, the Examiner relies on Meador only for the teaching of receiving data read from an object, which pertains to only claim 42. *See* Ans. 8. The Examiner confirms that Meador was applied as a secondary reference for claim 42¹, and indicates that the other claims subject to this rejection are obvious because they are anticipated by Pearson '232 and "anticipation is the epitome of obviousness." Response to Remand from the Board for Examiner Queries, mailed Sept. 15, 2004, at 3. We have already discussed and ruled on the rejection of claims 39-41, 43, 45-47, and 49-53 as anticipated by Pearson '232 (Rejection No. 2). Therefore, there is no need for us to revisit those same claims in the context of obviousness where anticipation is the sole basis of the § 103 rejection.

As to claim 42, Appellants argue that Meador does not teach receiving data read from an object in the manner recited, and that the combined references would not produce the claimed invention. *See* App. Br. 63. Dependent claim 42 recites that "the receiving step [of claim 39] includes receiving data read from an object and receiving manually input data." The

¹ In the Response to Remand, the Examiner states that Meador was also cited as a secondary reference for claim 44, but that claim is not identified in the statement of the rejection and the Examiner does not appear to have made any finding that Meador discloses the touch screen recited in claim 44, *see* Ans. 8.

receiving step of claim 39 pertains to receiving identifying data from a user. Thus, claim 42 refers to user data read from an object such as an ID card, and receiving manually input data such as a PIN. *See* Spec. 7, ll. 10-12. The Examiner found that Pearson '232 discloses manually inputting data, but not receiving data from an object. Ans. 8. The Examiner found that Meador discloses receiving data from an object, and concluded that it would have been obvious to substitute Meador's object read data for Pearson's manual data "because read data entry is more accurate, faster, and less prone to human input error than manual entry as taught by Meador et al." *Id.* (citing Meador, col. 9, ll. 12-25). The portion of Meador upon which the Examiner relies pertains to container identifying information, not user information. The Examiner has not adequately articulated why one of ordinary skill would substitute container data for Pearson's manually inputted data to arrive at a system receiving user data by both manual inputting and object reading. As such, we are constrained to reverse the rejection of claim 42 as obvious over Pearson '232 and Meador.

Rejection No. 4: The rejection of claims 38-53 under 35 U.S.C. § 103(a) as being unpatentable over Pearson '232 and Blechl

Similar to the previous rejection, the Examiner rejected several claims but only applies the secondary reference, Blechl, to claims 42 and 44. Response to Remand from the Board for Examiner Queries, mailed Sept. 15, 2004, at 3; *see* Ans. 9 (Blechl findings limited to the subject matter of claims 42 and 44). The Examiner again indicates that the other claims subject to this rejection are obvious because they are anticipated by Pearson '232 and "anticipation is the epitome of obviousness." Response to Remand at 3. We have already discussed and ruled on the rejection of claims 38-41, 43, and

45-53 as anticipated by Pearson ‘232 (Rejection No. 2). Therefore, there is no need for us to reach the issue as to whether the subject matter of those claims is also obvious where anticipation is the sole basis of the § 103 rejection.

Appellants assert that this obviousness rejection should be reversed because Pearson ‘232 is not prior art. *See* App. Br. 65. However, this rejection implicates only claims 42 and 44, and we have found that Pearson ‘232 is prior art as to those claims. Fact 3.

Claim 42

Claim 42 recites that the receiving step of claim 39 includes receiving user identifying data read from an object and receiving manually input data. Pearson ‘232 discloses the manual entry of a password, but not reading data from an object. *See* Fact 9; Ans. 9. Blechl discloses a drug dispenser where the authorized user swipes an ID card and inputs a PIN. Fact 11.

Appellants’ claimed subject matter would have been obvious as the application of a known technique to a known device, ready for improvement, to yield predictable results. *See KSR Int’l. Co.*, 550 U.S. at 417. Also, Blechl’s teaching of the use of both an ID card and a PIN with a drug dispensing device provides one of ordinary skill with a reason to combine the references. Thus, we are not persuaded by Appellants’ argument that the rejection should be reversed due to a lack of a teaching, suggestion or motivation to combine the references’ teachings, App. Br. 66. *See also KSR Int’l Co.*, 550 U.S. at 418-19 (rejecting the rigid requirement of a teaching, suggestion or motivation to combine known elements in order to show obviousness).

We are also not persuaded by Appellants' argument that the proposed modification would destroy the intended operability of the Pearson '232 device. App. Br. 66; *see id.* at 67 (asserting that the combination would destroy the reference's utility and advantages). It seems that applying Blechl's teachings would improve, not detract from, the operability of the Pearson's device.

Appellants' argument that it would not be obvious to modify Pearson's device to include "an unnecessary and costly card reader arrangement" is not persuasive. App. Br. 66. Even if we assume that one of ordinary skill would have found it cost prohibitive to build an embodiment, the ordinary artisan would nonetheless have recognized the predictable results of using a card reader as taught by Blechl, and thus would have considered the claimed subject matter to be obvious.

We affirm the rejection of claim 42 as obvious over Pearson '232 and Blechl.

Claim 44

Claim 44 recites a touch screen on which patient identifying data is displayed and where the inputting step of claim 38 includes touching the touch screen in an area adjacent the patient identifying indicia. Appellants admit that Blechl discloses a touch screen, but make the conclusory assertions that it would not be obvious to combine Blechl with Pearson '232 and that the combined teachings would not result in the claimed invention. App. Br. 67. The Examiner concluded that "[i]t would have been obvious to display and enter data via a touch screen because a touch screen display is convenient and simple and easier to use than keyboards and takes up no

more space than the monitor takes absent the touch screen feature . . . ”

Ans. 9. The Examiner has set forth a reasonable rationale underlying the conclusion of obviousness, and Appellants have not persuaded us otherwise. Further, we fail to see why combined teachings of Pearson’s system and Blechl’s touch screen would not result in the claimed subject matter. We affirm the rejection of claim 44 as obvious over Pearson ‘232 and Blechl.

Rejection No. 5: The rejection of claims 48-53 under 35 U.S.C. § 103(a) as being unpatentable over Halvorson

Claim 48

Appellants argue that claim 48 is not obvious because Halvorson fails to disclose the inputting patient data step. App. Br. 70. Appellants’ argument is not persuasive. Halvorson discloses files containing patient information, Fact 12, and the Examiner reasonably concluded that inputting data would have been obvious because Halvorson tracks such data and the data would need to be entered before tracking, Ans. 11. Further, the inputting of patient identification is disclosed, or at least suggested, by the nurse’s selection of a patient prior to medication dispensing. Fact 15.

Appellants also argue that Halvorson fails to disclose the modifying data step. App. Br. 70-71. Appellants contend that Halvorson does not disclose: 1) that the data is modified in response to the performance of the inputting patient identifying data step and the removing a medical item with a dispenser mechanism step, or 2) that the modified data represents the dispense of the type of medical item. *Id.* at 70-72. In Halvorson’s system, medications are delivered to the nurse by the mechanical dispenser (with its dispensing mechanism) after the nurse selects a patient, and the system

maintains records of medications dispensed. Facts 12, 14, 15. Thus, the modifying data step is at least suggested by Halvorson.

Appellants assert that Halvorson's system is not capable of verifying that a medical item is actually removed from a dispenser mechanism, and could produce inaccurate records. App. Br. 70-71. Not only does the claim lack a requirement of verification and accuracy, but Appellants' arguments are based on the untenable premise that it would not be obvious to one of ordinary skill to develop a system having a level of accuracy appropriate for the dispensing of narcotics and other medications. *See KSR Int'l Co.*, 550 U.S. at 421 ("A person of ordinary skill is also a person of ordinary creativity, not an automaton.")

We are not persuaded by Appellants' argument that "there is no teaching, suggestion, or motivation cited for combining or modifying features of the applied reference so as to produce Appellants' invention." App. Br. 72. This argument is foreclosed by *KSR*, in which the Court rejected the rigid requirement of a teaching, suggestion or motivation to combine known elements in order to show obviousness. *KSR Int'l Co.*, 550 U.S. at 418-19. The Court noted that an obviousness analysis "need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *Id.* at 418. Even if Halvorson does not explicitly or inherently disclose Appellants' method, Halvorson provides a suggestion, as discussed above, to modify the disclosed system to arrive at Appellants' claimed subject matter.

Claim 49

Appellants first argue that Halvorson does not disclose the step of inputting patient identifying data as recited in claim 49. App. Br. 72-73. For the reasons discussed in the context of the similar limitation of claim 48, we do not find this argument persuasive.

Appellants next argue:

Halvorson also does not disclose the steps of “determining . . . that the user identifying data . . . corresponds to authorized user data” and “providing access to at least one of the type medical item to the user from a storage device” and “storing data . . . indicating that the . . . type medical item has been provided for the patient.”

App. Br. 73; *see also id.* at 74 (asserting that Halvorson does not link the authorized user data with providing access to medical items). Halvorson discloses a system that maintains a file containing nurses’ passwords, discloses that medications are dispensed to authorized persons, discloses that nurses are normally authorized to execute the “Routine Meds” function which results in medications being delivered to the nurse from a mechanical dispenser, and discloses that the system maintains files regarding the dispensing of medications. Facts 12, 14, 15. The system is also capable of causing the dispenser to lock and unlock access doors. Fact 13. Appellants have not persuaded us that the identified features are not disclosed, or at least strongly suggested, by Halvorson.

Appellants again argue that Halvorson lacks verification and confirmation that the correct medical item was actually dispensed. App. Br. 73-74. Claim 49 does not require such things. In particular, we note that Appellants’ assertion that “Halvorson does not disclose storing data indicating that the requested medical item was actually dispensed,” *id.* at 73,

is not commensurate with the language of claim 49. The claim merely requires the storing of data indicating that the medical item has been provided, not the storing of accurate data. In other words, the limitation is satisfied even where a medication fails to fall from the dispenser's spiral (like a bag of potato chips stuck in a vending machine) but the MEDICATION HISTORY file is updated to reflect that the dispensing occurred.

As with claim 48, Appellants again argue that "there is no teaching, suggestion, or motivation cited for combining features of the applied reference so as to produce Appellants' invention." App. Br. 75. We again are not persuaded by this argument for the reasons set forth above regarding claim 48.

Claim 50

Claim 50 adds to the "providing access" step of claim 49 the requirement of dispensing the medical item from a dispenser device. Appellants argue that "Halvorson does not disclose or suggest dispensing using a dispenser device in the manner recited." App. Br. 75. For the reasons set forth above regarding the providing access limitation of claim 49, we find Appellants' argument unpersuasive. *See also* Facts 12-15.

Claim 51

Claim 51 adds to the "providing access" step of claim 49 the requirement of "unlocking a drawer to enable access to the at least one of the type medical item." Appellants argue that Halvorson does not disclose unlocking a drawer, and even if it did, that the reference does not disclose

the “providing access” step of claim 49. App. Br. 76. The Examiner found that Halvorson does not disclose unlocking a drawer to enable access to the at least one of the type medical item. Ans. 11. The Examiner determined that it would have been obvious for Halvorson to unlock drawers as a means of controlling patient specific medications. *Id.* The Examiner stated: “As the drawer is behind the computer controlled lock door, it is well within the skill of one in the art to lock the drawer instead of the drawer [sic, door] covering it.” *Id.*

We agree with the finding that the Halvorson discloses a drawer behind a computer controlled door. *See* Fact 13. The Examiner’s conclusion of obviousness is supported by a reasonable rationale. Appellants have not persuaded us of error in the rejection of claim 51 as obvious over Halvorson.

Claim 52

Appellants argue that “Halvorson does not disclose the recited ‘releasing’ of a medical item from a device holding the medical item in the manner recited.” App. Br. 76. In support of the rejection, the Examiner points to Halvorson’s description of the electro-mechanical dispenser. *See* Ans. 10 (citing Halvorson, col. 3, ll. 28-63). Appellants do not explain why the “releasing” limitation is not disclosed, or at least rendered obvious, by the disclosure of a dispenser having spiral drive members that release doses from the tray, Fact 12. As such, Appellants have not shown the rejection of claim 52 to be erroneous.

Claim 53

Appellants argue that Halvorson does not disclose unlocking a lock to enable access to a storage location, and even if it did, that the reference does not disclose the “providing access” step of claim 49 (from which claim 53 depends). App. Br. 76-77. For the reasons set forth above concerning the “providing access” step of claim 49, we find Appellants’ arguments unpersuasive.

In summary, Appellants have not persuaded us that the Examiner erred in rejecting claims 48-53 as obvious over Halvorson.

Appellants’ Reply Brief

The Reply Brief contains certain general arguments, Reply Br. 6-7, which we now address.

Appellants argue that the Examiner has not made a “full determination” as to the level of skill in the art. Reply Br. 7. Other than offering this criticism, Appellants themselves do not appear to have addressed the level of ordinary skill in the art of medical item dispensing systems. We consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown’”) (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)). The prior art indicates that the ordinary artisan has a high level of skill. Fact 16. We also note that it appears that the Examiner, consistent

with our finding, considered a person of ordinary skill to include one who has completed an electrical engineering undergraduate curriculum. *See Ans. 14.*

Appellants also assert that “[t]he record shows that the reasons for modifying reference features in the rejections is based on the opinion of the examiner” rather than “the opinion a person of ordinary skill in the art.” Reply Br. 7. However, Appellants fail to direct our attention to where in the record this is allegedly shown, and do not even tie this assertion to any particular rejection, prior art reference, or claim. As such, Appellants have not persuaded us that the Examiner failed to evaluate the obviousness of Appellants’ claimed subject matter from the perspective of a person of ordinary skill in the art.

Appellants’ “Other Comments”

Appellants assert that the Office has improperly included confidential information in the prosecution history file for the application at issue in this case. App. Br. 77-78. Appellants “request that the Office strike said information from the record, and that proof of such act be presented to Appellants.” *Id.* at 78. However, Appellants’ request pertains to a procedural matter, not the propriety of a rejection, and thus involves a matter not within the jurisdiction of the Board. *See 35 U.S.C. § 6(b); In re Mindick, 371 F.2d 892, 894 (CCPA 1967).*

CONCLUSIONS

Rejection No. 1

We conclude that Appellants have not shown that the Examiner erred in finding that Pearson ‘029 discloses the “modifying data” step of claim 48, but have shown that the Examiner erred in finding that Pearson ‘029 discloses the step of determining that the user is an authorized user as recited in claim 49. Thus, we affirm the rejection of claim 48 as anticipated by Pearson ‘029, and reverse the rejection of claims 49-53 as anticipated by Pearson ‘029.

Rejection No. 2

We conclude that Appellants have shown that the Examiner erred in finding that Pearson ‘232 is prior art against Appellants’ claims 38 and 48, but not as to claims 39-41, 43, 45-47, and 49-53. We also conclude that Appellants have shown that the Examiner erred in finding that Pearson ‘232 discloses limitations of certain rejected claims, but have failed to show error as to other claims. We reverse the rejection of claims 38, 41, 45, 46, and 48 as anticipated by Pearson ‘232, and affirm the rejection of claims 39, 40, 43, 47, 49-53 as anticipated by Pearson ‘232.

Rejection No. 3

We conclude that Appellants have shown that the Examiner failed to articulate reasoning with some rational underpinning sufficient to support the conclusion that the subject matter of claim 42 would have been obvious over Pearson ‘232 and Meador. Thus, we reverse the § 103 rejection of claim 42 based on those references.

Rejection No. 4

We conclude that Appellants have not demonstrated that the Examiner erred in concluding that it would have been obvious to combine the teachings of Pearson '232 and Blechl so as to arrive at the subject matter of claims 42 and 44. Thus, we affirm the § 103 rejection of claims 42 and 44 based on those references.

Rejection No. 5

We conclude that Appellants have not shown error in the Examiner's conclusion that Halvorson renders obvious the subject matter of the rejected claims 48-53. Thus, we affirm the § 103 rejection of claims 48-53 based on Halvorson.

DECISION

The decision of the Examiner to reject claims 38, 41, 45, and 46 is reversed. The decision of the Examiner to reject claims 39, 40, 42-44, and 47-53 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

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